

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1933.

No. 5988

397

E. V. R. SWEET, APPELLANT,

vs.

H. R. HOWENSTEIN COMPANY, A CORPORATION.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

FILED JUNE 16, 1933.

PRINTED MARCH 21, 1934.

Court of Appeals of the District of Columbia

APRIL TERM, 1933.

No. 5988

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vs.

H. R. HOWENSTEIN COMPANY, A CORPORATION,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5988.

E. V. R. SWEET, Appellant,

vs.

H. R. HOWENSTEIN COMPANY, a Corporation.

a Supreme Court of the District of Columbia.

At Law.

No. 80327.

E. V. R. SWEET, Plaintiff,

vs.

H. R. HOWENSTEIN COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed September 30, 1931.

In the Supreme Court of the District of Columbia.

At Law.

No. 80327.

E. V. R. SWEET, Plaintiff,

vs.

H. R. HOWENSTEIN COMPANY, a Corporation, Defendant.

First Count.

The plaintiff, E. V. R. Sweet, sues the defendant, H. R. Howenstein Company, a corporation, doing business in the

District of Columbia, for that, whereas, heretofore, to-wit, at Washington, in the District of Columbia, on or about the 12th day of August, 1931, the defendant employed the plaintiff to negotiate the sale of certain real estate owned by it and located at No. 1201 13th Street, N. W., Washington, D. C., for the sum of \$282,500.00 and undertook and promised to pay the plaintiff the sum of \$8,900.00 when he should produce a purchaser ready, able and willing to purchase the said property on terms to be mutually agreed upon, and thereupon, at the above time and place the plaintiff produced one Bertha M. Fravel, who was then and there able, ready and willing to purchase the said property upon terms and conditions then and there mutually agreed upon, and the said Bertha M. Fravel did then and there enter into a contract to purchase the said property at the said price of \$282,500.00 upon the said mutually agreeable terms. Whereupon, it became and was the duty of the defendant to pay to the plaintiff the sum of \$8,900.00; nevertheless the defendant, although often requested so to do, did not pay to the plaintiff the said sum of \$8,900.00, or any part thereof.

Wherefore, plaintiff brings his suit and claims the sum of \$8,900.00, with interest from the 12th day of August, 1931, besides costs.

Second Count.

And the plaintiff sues the defendant for other money due from the defendant to the plaintiff, for that, whereas, heretofore, to-wit, at Washington, in the District of Columbia, on or about the 12th day of August, 1931, the defendant employed the plaintiff to negotiate the sale of certain real estate owned by it, located at No. 1201 13th Street, N. W., Washington, D. C. for the sum of \$282,500.00, and undertook and promised to pay the plaintiff so much as his services were reasonably worth, when he should produce a purchaser ready, able and willing to purchase the said property on terms to be mutually agreed upon, and thereupon at the above time and place the plaintiff produced one Bertha M. Fravel, who was then and there able, ready and willing to purchase the said property upon terms and conditions mutually agreed upon and the said Bertha M. Fravel did then and there enter into a contract to purchase the said property at the said price of \$282,500.00, upon the said mutually agreeable terms. Whereupon, it became and was

the duty of the defendant to pay to the plaintiff the amount that his services were reasonably worth, and the plaintiff says that his services were reasonably worth the sum of \$8,900.00. Nevertheless, the defendant, although often requested so to do, did not pay to the plaintiff the said sum, or any part thereof.

3 Wherefore, plaintiff brings his suit and claims the sum of \$8,900.00 with interest from the 12th day of August, 1931, besides costs.

ROBERT H. McNEILL,
HERBERT S. WARD,
Attorneys for Plaintiff.

Affidavit of E. V. R. Sweet.

DISTRICT OF COLUMBIA, ss:

I, E. V. R. Sweet, being first duly sworn, depose and say that I am the plaintiff in the above entitled cause, that I acted as a real estate broker in negotiating a contract of purchase and sale between the H. R. Howenstein Company, a corporation, and Mrs. Bertha M. Fravel, by which the H. R. Howenstein Company agreed to sell and the said Bertha M. Fravel agreed to purchase, upon terms mutually agreed upon and to each satisfactory, The Wade Apartments, located at No. 1201 13th Street, N. W., Washington, D. C. That after the signing of the said contract by the above named parties on August 12, 1931, the defendant, H. R. Howenstein, as a consideration for my services in the above referred to contract, rendered for the H. R. Howenstein Company, undertook and promised to pay to me the sum of \$8,900.00; \$2,500.00 to be paid in cash, and the balance at the rate of \$400.00 per month, as if and when paid by the purchaser; that the defendant, H. R. Howenstein, has not paid the said sum of \$2,500.00, or any part thereof, but has sought to deny and repudiate all liability under the said contract.

4 Wherefore, I am advised and believe that the full sum is now due and payable in the amount of \$8,900.00.

E. V. R. SWEET.

Subscribed and sworn to before me this 28th day of September, 1931.

[NOTARIAL SEAL.]

MAE HELM,
Notary Public for D. C.

Pleas.

Filed October 22, 1931.

* * * * *

Now comes the defendant by its attorneys, Messrs. Minor, Gatley & Drury, and for plea to the declaration filed herein, and to each count thereof, says:

It admits that it is a corporation doing business in the District of Columbia, and that on the 12th day of August, 1931 it owned premises numbered 1201 Thirteenth Street, Northwest, in the District of Columbia, which it says was improved by an apartment house known as the Wade. It denies that on said date it employed the plaintiff to negotiate a sale of said premises, and it denies that it undertook and promised to pay to the plaintiff the sum of Eight Thousand Nine Hundred Dollars (\$8,900) or the reasonable value of his services or any sum whatsoever, when the plaintiff should procure a purchaser for said property.

The defendant admits that on the 12th day of August, 1931, the plaintiff brought to its office one Bertha M. Fravel, but this defendant has no knowledge or information sufficient to form a belief as to whether the said Bertha M. Fravel was in fact ready, able and willing to purchase said

property upon terms agreeable to the defendant. It
5 admits that on said date the said Bertha M. Fravel did sign what was supposed to have been a contract to purchase said property from the defendant for the sum of Two Hundred Eighty-two Thousand Five Hundred Dollars (\$282,500.) but it says that because of the matters and things hereinafter set forth said paper signed by the said Bertha M. Fravel was not in fact a contract to purchase said property. The defendant denies that it thereupon became its duty to pay to the plaintiff the sum of Eight Thousand Nine Hundred Dollars (\$8,900.), or the reasonable value of his services, or any other sum whatsoever, and avers the facts to be as follows:

On or about, to wit, August 1, 1931, the plaintiff approached an officer of the defendant corporation, stating that he had a client who was interested in the purchase of said premises 1201 Thirteenth Street, Northwest, belonging to the defendant, and enquired if said defendant would pay him a commission if he sold said property to her. Said

plaintiff was advised by said officer that a commission would be paid to him only if he was a licensed real estate broker and that if he was such he would be paid the commission usually paid such brokers; and thereupon the said plaintiff assured said officer that he was a licensed real estate broker, whereas, as the defendant is now informed and believes and expects to prove at the trial hereof, said plaintiff was not in fact such. Thereafter the said plaintiff, on, to wit, the 12th day of August, 1931, brought to the office of the defendant the aforesaid Bertha M. Fravel who represented herself, and who was represented by the plaintiff, to be ready able and willing to purchase the aforesaid property of the defendant and to make a cash deposit of

Five Thousand Dollars (\$5,000.) on account thereof
6 as required by the defendant; and there was signed by the defendant and the said Bertha M. Fravel a certain form of receipt and sales agreement whereby the defendant acknowledged the receipt from the said Bertha M. Fravel of a deposit of Five Thousand Dollars (\$5,000.) to be applied as part payment on the purchase by her of said premises aforesaid for the sum of Two Hundred Eighty-two Thousand Five Hundred Dollars (\$282,500.) upon certain terms and conditions therein more fully set forth. Said form of receipt and agreement provided that the said Bertha M. Fravel should comply with the terms thereof within 18 days from said August 12, 1931 and further provided that the entire amount of said deposit of Five Thousand Dollars (\$5,000.) should be held by the said H. R. Howenstein Company until full settlement should be made under said agreement. Thereupon the said Bertha M. Fravel delivered to the defendant a certain check in the sum of Five Thousand Dollars (\$5,000.) drawn upon a banking institution in the District of Columbia and payable to the order of the H. R. Howenstein Company, for the purpose of making the deposit of Five Thousand Dollars (\$5,000) in cash referred to therein and required by the defendant. Thereafter, to wit, the day and date aforesaid, the plaintiff and H. R. Howenstein entered into an agreement in writing with respect to said supposed sale to Bertha M. Fravel, in consideration of said supposed sale and of the fact that said plaintiff represented himself to be a licensed real estate broker, whereby the said H. R. Howenstein undertook and agreed to pay to the plaintiff a commission

of Eight Thousand Nine Hundred Dollars (\$8,900.) to be paid said plaintiff only when, as and if payments were made by the said Bertha M. Fravel under said agreement aforesaid, said sum to be paid in the following amounts, to wit,

7 Two Thousand Five Hundred Dollars (\$2,500.) out of the cash payment to be made by said purchaser on account of the purchase of said property and the balance at the rate of Four Hundred Dollars (\$400.) each month thereafter out of the monthly payments of Two Thousand Fifty-six Dollars and Twenty-seven Cents (\$2,056.27) to be made by said purchaser on account of the purchase of said property. Thereafter, to wit, on the same day and date aforesaid, with the knowledge and at the request of the plaintiff, the defendant attempted to cash said check for Five Thousand Dollars (\$5,000.) tendered as a deposit as aforesaid, in order that said proposed purchaser should comply with said proposed contract of sale by making a deposit of Five Thousand Dollars (\$5,000.) in cash, and was advised by the bank upon which the same was drawn that the same could not be cashed or honored by it. Whereupon, the said plaintiff was on, to wit, the same day and date aforesaid, immediately advised that said check could not be cashed by the defendant and was not a deposit as required by the terms of the aforesaid agreement and as required by the defendant, and said check was, on the day and date aforesaid, delivered to the plaintiff as the agent of the said Bertha M. Fravel, and said plaintiff has ever since retained, and now retains, said check so delivered to him, and said cash deposit of Five Thousand Dollars (\$5,000.) has never been made. Thereafter, as the defendant is informed and believes, and expects to prove at the trial hereof, the plaintiff made further unsuccessful efforts to persuade the said Bertha M. Fravel to make the required cash deposit of Five Thousand Dollars (\$5,000.) but said plaintiff subsequently abandoned such efforts, and thereafter sought to purchase said property from the de-

8 fendant on behalf of himself and another.

MINOR, GATLEY & DRURY,
By ARTHUR P. DRURY,
Attorneys for Defendant.

Joinder in Issue.

Filed November 30, 1931.

* * * * *

The plaintiff joins issue on the plea by the defendant filed herein.

ROBERT H. McNEILL,
HERBERT S. WARD,
Attorneys for Plaintiff.

Note of Issue.

Attorneys for Plaintiff: Herbert S. Ward and Robert H. McNeill.

Attorneys for Defendant: Minor, Gatley & Drury.

Date of last pleading: November 28, 1931.

ROBERT H. McNEILL,
HERBERT S. WARD,
Attorneys for Plaintiff.

9 Supreme Court of the District of Columbia.

Thursday, February 16, 1933.

Session resumed pursuant to adjournment, Hon. Jesse C. Adkins, Justice, presiding.

* * * * *

Come again the parties hereto in manner as aforesaid and the same jury that was respited yesterday, whereupon, the plaintiff withdraws the third count of the declaration herein, and after this cause is further heard and given to the jury in charge they upon their oath say they find for the defendant on the second count of the declaration, and for the defendant on the first count of the declaration, by the direction of the Court.

The plaintiff in open Court waives his right for further time to file a motion for a new trial and consents that judgment may now be entered on this verdict. Wherefore, it is considered that plaintiff take nothing by this action that defendant go hence without day, be for nothing held and recover of plaintiff its costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the plaintiff by his attorney of record, in open Court, notes an appeal to the Court of Appeals of this District; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

10

Memoranda.

March 2, 1933.—Undertaking on appeal (\$100.00) approved and filed.

March 9, 1933.—Time to file Plaintiff's Bill of Exceptions extended 10 days.

March 23, 1933.—Proposed Bill of Exceptions and Notice filed.

Assignment of Error.

Filed March 23, 1933.

* * * * *

Comes now the plaintiff, E. V. R. Sweet, and says that the Court erred as follows:

1. In directing a verdict in favor of the defendant against the plaintiff.

ROBERT H. McNEILL,
HERBERT S. WARD,
Attorneys for Plaintiff.

Memorandum.

April 7, 1933.—Bill of Exceptions submitted.

11

Supreme Court of the District of Columbia.

Monday, June 5, 1933.

Session resumed pursuant to adjournment, Hon. Jesse C. Adkins, Justice, presiding.

* * * * *

It appearing to the Court that the Bill of Exceptions in this cause was submitted on the 7th day of April, 1933, and signed on the 16th day of April, 1933, and it further appearing that no entry was made of such submission and

signing thereof, it is now ordered, nunc pro tunc, that said Bill of Exceptions, taken at the trial of this cause and submitted and signed upon the dates heretofore mentioned be, and the same is hereby made of record as of the 16th day of April, 1933.

Designation of Record.

Filed March 24, 1933.

* * * * *

The Clerk will please prepare the record on appeal in the above-entitled cause to contain the following:

1. Declaration.
2. Pleas of defendant.
3. Joinder—note of issue.
4. Order of Court withdrawing third count of plaintiff's declaration.
5. Order of Court allowing consent verdict for defendant on second count of declaration.
6. Court's direction of verdict for defendant on first count of declaration.
7. Jury's verdict for defendant.
- 12 8. Memorandum of notice of appeal.
9. Memorandum of posting and approval of appeal bond.
10. Notice of submission of Bill of Exceptions.
11. Notice of signing of Bill of Exceptions.
12. Bill of Exceptions.
13. Assignment of Errors.
14. Copy of this designation.

ROBT. H. McNEILL,
HERBERT S. WARD,
Attorneys for Plaintiff.

Service of copy of the above Designation of record accepted this 24th day of March, A. D., 1933.

ARTHUR P. DRURY,
Attorney for Defendant.

13 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing

pages numbered from 1 to 12, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 80327 at Law, wherein E. V. R. Sweet is Plaintiff and H. R. Howenstein Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 12th day of June, 1933.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

14 In the Supreme Court of the District of Columbia,
Holding a Law Court.

Law. No. 80327.

E. V. R. SWEET, Washington, D. C., Plaintiff,

vs.

H. R. HOWENSTEIN COMPANY, a Corporation, 1315 H Street
N. W., Washington, D. C.

Bill of Exceptions.

Be it remembered that the above entitled cause came on for trial on the 15th day of February, 1933, before Mr. Justice Adkins, and a jury in the Circuit Division of this Honorable Court; Robert H. McNeill and Herbert S. Ward appearing for the plaintiff, E. V. R. Sweet, and Arthur P. Drury appearing for the defendant, H. R. Howenstein Company, a corporation; whereupon the following proceedings were had:

15 **E. V. R. Sweet**, the plaintiff, testified as follows:

I am engaged in the real estate business in the District of Columbia, and have been so engaged for 13 years; I have known the Howenstein Company and Mr. Howenstein about eight years and Bertha M. Fravel about two years; I am familiar with the property known as the Wade Apartments at 13th and M Streets, Northwest; I discussed the matter of the sale of the property with Mrs. Fravel some time in June,

1931, and was furnished by Mr. Howenstein with information about the property, which information was given me "so that I might have the correct data to furnish my client relative to the income and outgo of the property;" on August 12, 1931, the Howenstein Company, through Mr. Howenstein, entered into a contract, a photostatic copy of which is attached hereto, marked Exhibit 1, the original of which was offered and received in evidence; Mrs. Fravel, her son, Mr. Howenstein and I were present when the contract was executed; Mrs. Fravel signed a check for \$5,000 and handed it to Mr. Howenstein as her deposit; said check was offered and received in evidence and is in words and figures following:

"No. —. Washington, D. C., August 12th, 1931.

American Security and Trust Company, 7th and Mass.
Ave. Branch.

Pay to the order of H. R. Howenstein Co. Five Thousand
and no/100 Dollars. \$5,000.00.

(Sgd.)

MRS. B. M. FRAVEL."

(Endorsed on back of check:) "H. R. Howenstein Co. By (Sgd.) H. R. Howenstein, Pres." After the contract was signed, Mrs. Fravel and her son left the office and I remained to have the notation with respect to my commission written on the contract as follows: "Commission to Sweet to be \$8900—total—\$2500 in cash and \$400 a month when as and if paid by purchaser, (Sgd.) H. R. Howenstein, Approved E. V. R. Sweet"; I returned to Mr. Howenstein's office later that afternoon and Mr. Howenstein told me that the check of Mrs. Fravel had not been honored because it was drawn on a savings account and had to be accompanied by a savings deposit book before it could be cashed, and told me to go to Mrs. Fravel and get the bank pass book; I went to Mrs. Fravel's home but did not find her in and then returned and told that to Mr. Howenstein; Mr. Howenstein then said that Mrs. Fravel had been in the office during my absence and wanted to withdraw from the deal as she was very nervous over the transaction; I saw Mrs. Fravel that evening and then told Mr. Howenstein that Mrs. Fravel was going away for a few days, that she wanted the building very much, and this was just a detail I

thought could be worked out; later I wrote Mr. Howenstein a letter, which was offered and received in evidence, and is in words and figures following:

August 19, 1931.

Mr. H. R. Howenstein,
c/o H. R. Howenstein Co.,
1315 H Street, N. W.,
Washington, D. C.

President."

DEAR SIR:

This is to advise you that I shall expect to hold you and Mrs. B. M. Fravel for services rendered in connection with the sale of your property known as the "Wade Apartments" located at the N. E. corner of 13th and M Streets, N. W.

I understand Mrs. Fravel will return to Washington the last of this week and I will keep you informed regarding the developments.

Very truly yours,

E. V. R. SWEET."

A few days following that letter I again saw Mr. Howenstein and he handed Mrs. Fravel's check for \$5,000 to
17 me, and some days later I got two letters from Mrs. Fravel; I have never been paid anything for my services.

On or about August 13, 1931, the defendant, without the knowledge or consent of the plaintiff, wrote Mrs. Bertha M. Fravel a letter, which was offered and admitted in evidence, in the words and figures following:

"August 13, 1931.

Mrs. B. M. Fravel,
Orkney Springs Hotel,
Orkney Springs, Va.

DEAR MRS. FRAVEL:

Not having heard from you again yesterday and as your son informs us that you have left the City, the only thing left for us to do is to call the deal off for the purchase of 1201 13th St. N. W.; as your check was not honored by the bank and therefore cannot be considered as a deposit on the property. In the meantime we have placed the property back on the books for sale and returned your check with our endorsement cancelled to your agent. Have also cancelled

the deposit receipt signed by you; but should you change your mind and decide to negotiate again for the property we will be glad to talk the matter over with you and may come to some agreement.

Very truly yours,

(Sgnd.) H. R. HOWENSTEIN COMPANY,
H. R. HOWENSTEIN,

That plaintiff understood that Mrs. Fravel had stopped payment on this check; that so far as he knew Mrs. Fravel had not purchased or gone into possession of the Wade Apartments.

On cross examination the witness further testified:

At the time the contract with Mrs. Fravel was signed Mr. Howenstein suggested a \$5,000 deposit and Mrs. Fravel said "I think I have that much money available in bank," and pursuant to that the provision about the deposit was put in the contract and the check was given; the check was not honored and Mr. Howenstein never got the \$5,000; at the time the notation with respect to my commission was placed on the contract, both Mr. Howenstein and myself thought we had the \$5,000 referred to in the contract; when this contract was signed I was living at the Ebbitt Hotel at 10th and H Streets, and operated from the hotel;

18 I have no office, but operate from home and I have no telephone listing; the first conversation I had about this property in the office of the Howenstein Company was with Mr. Rowzee, and I told him that I had a client who was interested in the purchase of property to be used in connection with a rooming house; I asked Mr. Rowzee directly about the availability of the Wade; I don't believe I said anything about a commission, Mr. Rowzee may have said something to me at that time about a commission, he may have said that we would divide the commission but I am not sure; the next time I saw Mr. Howenstein and told him that I had someone who was interested in buying the Wade and asked if he would pay a commission if my client bought the property; Mr. Howenstein never said anything to me about being a licensed broker, but I was not a licensed broker; Mr. Howenstein gave me the price of \$300,000 on the Wade; later I told Mr. Howenstein my client preferred to lease the Wade rather than buy it, but that was not done; I had known Mrs. Fravel at least four months prior to the time I went to Mr. Howenstein, and I had tried to interest her in

the Grafton Hotel, the Conard Apartment and London Hall Apartment; I became quite well acquainted with Mrs. Fravel's business; she was running a rooming and boarding house, and in my opinion was a good sound business woman; I gave this information to Mr. Howenstein; Mrs. Fravel was not in the city just prior to August 12th, and I made arrangements through her son to have her present on that day; I know a Miss Fenwick who runs a boarding house near Mrs. Fravel and I remember telling Mrs. Fravel that I had seen Miss Fenwick going through the Wade, but I do not recall telling her that I had seen Miss Fenwick in Howenstein's office; on the 12th of August Mrs. Fravel and her son and I went to see Mr. Howenstein about buying the property, and she first offered \$250,000, and then got up to \$275,000; I said nothing during the conference except that

19 I spoke up at the last of it suggesting they compromise on the \$282,500 figure; I was trying to get Mr.

Howenstein below his price of \$300,000; as finally agreed to, Mrs. Fravel was to pay \$282,500, of which \$12,500 was to be paid in United States money, of which \$5,000 was to be paid as a deposit; there was no discussion with reference to the \$5,000, or \$12,500, about anything but dollars; after the contract was signed, I remained with Mr. Howenstein and discussed the question of commission; we agreed on \$8,900, but I do not know whether that is more or less than the usual broker's commission, and out of that I was to pay Mr. Howenstein's sales manager \$500; when the notation about commission was placed on the contract, I asked Mr. Howenstein for \$500 on account, and he said that as a matter of business he ought to first send the check down for collection; Mr. Howenstein never said anything to me about the provision of the contract providing that the Howenstein Company should hold the entire deposit until the sale was closed; he said he would not pay me anything until the check was cashed, but he never asked me to have it cashed or certified, and I never refused to do that; instead he sent Mr. Rowzee to cash the check, and I was told by Mr. Rowzee later that the check could not be cashed; I saw Mrs. Fravel after that and within a week after the 12th of August Mr. Howenstein gave me back her check after cancelling his endorsement; Mr. Howenstein was very anxious to have the deal consummated, and so was I, and asked him to let the matter rest for a few days and I would try to get her to go through with the deal; I have had possession of

Mrs. Fravel's check for \$5,000 since it was given me by Howenstein; my letter to Mr. Howenstein of August 19th was written the day after he returned the check to me, and when I wrote the letter I had no intention of doing anything more than I had then done; within a week I went back to the office of the Howenstein Company to see if the Wade would be sold on the same terms to any other responsible person, and around the first of September, 1931, I
20 took my then attorney, Norman Landreau, to the office of Mr. Howenstein to discuss a purchase by Mr. Landreau; if I said at that conversation that I would put \$5,000 in such a deal I have forgotten it; when I was dealing with Mrs. Fravel I offered to put from \$3,000 to \$5,000 in the property with her.

On redirect examination the witness further testified:

In my examination of Mrs. Fravel's financial status, I found she was a woman of good business standing, which was the reason why I recommended her as a good buyer to Mr. Howenstein; I told him she owned properties at 13th and Massachusetts Avenue clear of encumbrance, and had a good boarding and rooming house business; In my offer to her I was figuring on my commissions to make up my contribution to the purchase; the offer was not made because Mrs. Fravel said she could not put up \$12,500 in cash and have any money left with which to run her business.

Thereupon the plaintiff produced **Bertha M. Fravel**, who acknowledged her signature on the contract of August 12, 1931, and on check of August 12, 1931, and identified the aforesaid letter of August 13, 1931, written to her by the defendant.

And thereupon the plaintiff produced **R. E. Pollock**, who testified that he was employed by the American Security and Trust Company, Seventh Street Branch; that Mrs. B. M. Fravel had an account at that bank subject to check, and that she also had a savings account at that bank which was not subject to check; that on August 12, 1931, her checking account showed a balance of \$867.41; the highest balance between August 12 and September 1, 1931 was \$1671.04 on August 22, 1931; on September 1, 1931 the balance in the checking account was \$651.37; that on August 12th, her savings account showed a balance of \$7,035.62; the highest

balance between August 12, 1931 and September 1, 1931 was \$7,665.06 on August 31, 1931; that the witness had no knowledge as to whether or not Bertha M. Fravel had stopped payment on her check of August 12, 1931, but would see if that information could be produced.

Whereupon plaintiff dismissed the second count of the declaration, and rested.

Thereupon the defendant moved for a directed verdict, and after argument of counsel, during which counsel for plaintiff stated that the "notation on this contract is a notation which is integral with the contract as a whole," the said motion was granted by the Court, to which exception was duly noted by the plaintiff in open court. Whereupon the jury returned a verdict in favor of the defendant, and thereupon the plaintiff asked that a judgment be entered forthwith, waived motion for a new trial, and served notice of appeal in open court.

Now, therefore, the undersigned Judge of the Supreme Court of the District of Columbia before whom said cause was pending and said proceedings were had, being fully advised in the premises, doth find the foregoing to be a true Bill of Exceptions on behalf of said plaintiff, and that the same contains the substance of all the evidence introduced at the trial of said cause, the rules of the Court, and that each matter contained therein is true and correct, and the same is hereby signed, sealed and certified to and allowed as a full true and complete Bill of Exceptions.

JESSE C. ADKINS,

Justice.

Endorsed on cover: District of Columbia Supreme Court. No. 5988. E. V. R. Sweet, appellant, vs. H. R. Howenstein Company, a corporation. Court of Appeals, District of Columbia. Filed Jun. 16, 1933. Henry W. Hodges, Clerk.

H. R. HOWENSTEIN CO.
 INCORPORATED
REAL ESTATE, LOANS AND INSURANCE
 CAPITAL AND SURPLUS, \$1,000,000
 OFFICE, 1315 H STREET NORTHWEST
 WASHINGTON, D. C.

August 12th 1932

Received of **Bertha M. Farvel** a deposit of
Five Thousand ~~xx~~ ^{hundred} dollars (\$5000.00), to be applied as part payment of the purchase of **all of**
 lot 46 in square 281, improved by premises No. 1201-13th St., N.W. The Wade
 District of Columbia, at the price of **Two Hundred Eighty-two Thousand** ~~Five Hundred~~ ^{Five Hundred} dollars (\$282,500.00), on
 the following terms, to wit: \$ 12,500.00 in cash (of which amount the above deposit has been paid), and
 purchaser assumes Deed of Trust on property for the sum of \$150,000.00, bearing interest at 6
 per cent and due June 1st, 1932 and purchaser to give a second Deed of Trust for \$ 120,000.00,
 payable in ~~one~~ note with interest at the rate of 6 per cent per annum, until paid; said principal and interest
 payable in monthly installments of \$ 1000.00 on or before a set day in each and every month after date
 until paid, each installment when so paid to be applied, first, to the payment of the interest on the amount of principal
 remaining unpaid, and the balance thereof credited to the principal.

Purchaser agrees to pay to H. R. HOWENSTEIN CO. \$ 2056.27 on the 1st day of each month to
 be applied to payment of interest on first trust and interest and principal of second trust above noted. & taxes
 No guarantees, repairs, alterations, or improvements will be made by sellers of this property unless agreed
 to in writing and made part of this receipt, and no employee has the power to change or alter the terms of this con-
 tract. Sellers do not guarantee wall paper or plastering. It is understood the total rentals
 of the building are \$38,040.00 per year which includes flats now vacant.
 Title to property to be vested in a new company to be incorporated by
 purchaser.

Trustees in all deeds of trust are to be named by the parties secured thereby.

The property is sold free of encumbrance except as aforesaid; title is to be good of record and in fact subject,
 however, to covenants, conditions and restrictions of record, if any; otherwise said deposit is to be returned and
 sale declared off at the option of the purchaser, unless the defects are of such character that they may readily be
 remedied by legal action, but the seller and agent are hereby expressly released from all liability for damages by
 reason of any defect in the title. In case legal steps are necessary to perfect the title, such action must be taken
 by the seller promptly at his own expense, whereupon the time herein specified for full settlement by the purchaser
 will thereby be extended for the period necessary for such prompt action.

Rents, taxes, water rent, insurance and interest on existing encumbrances, if any, and operating charges
 are to be adjusted to the date of the transfer. Taxes, general and special, are to be adjusted according to the cer-
 tificate of taxes as issued by the Collector of Taxes of the District of Columbia, except that assessments for improve-
 ments completed prior to the date hereof, whether assessment therefor has been levied or not, shall be paid by the
 seller or allowance made therefor at the time of transfer.

Examination of title, tax certificate, conveyancing, notary fees and all recording charges, including those
 for purchase money trust, if any, are to be at the cost of the purchaser; provided, however, that if upon examination
 the title should be found defective, the seller hereby agrees to pay the cost of the examination of the title and also
 to pay to the agent herein a commission hereinafter provided for just as though the sale had actually been consum-
 mated and all the terms of this contract complied with.

Within 18 days from the date of acceptance hereof by the owner, or as soon thereafter as
 a report on the title can be secured if promptly ordered, the seller and purchaser are required and agree to make
 full settlement in accordance with the terms hereof. If the purchaser shall fail so to do, the deposit herein provided
 for may be forfeited at the option of the seller, in which event the purchaser shall be relieved from further liability
 hereunder, or without forfeiting the said deposit the seller may avail himself of any legal or equitable rights which
 he may have under this contract. In the event of the forfeiture of the deposit, the seller shall allow the agent one-
 half thereof as a compensation for his services to him.

Settlement is to be made at the office of H. R. HOWENSTEIN Co. or at the Title Company searching the title, and deposit with the Title Company or with H. R. HOWENSTEIN Co. of the purchase money, the deed of conveyance for execution and such other papers as are required of either party by the terms of this contract shall be considered good and sufficient tender of performance of the terms hereof.

1. Seller agrees to execute the usual special warranty deed.

All notices of violations of Municiple orders or requirements noted or issued by any Department of the District of Columbia, or prosecutions in any of the courts of the District of Columbia on account thereof against or affecting the property at the date of the settlement of this contract shall be complied with by the seller and the property conveyed free thereof. This provision shall survive the delivery of the deed hereunder.

The seller agrees to pay to H. R. HOWENSTEIN Co., the said agent, a commission of 5% on amounts to \$5,000 and 3% on all sums above that amount when sale is closed. The Title Company, or the Real Estate Office, through which settlement is made is hereby authorized and directed to make deduction of the aforesaid commission from the proceeds of the sale and to make payment thereof to the said agent. Entire deposit to be held by H. R. HOWENSTEIN Co. until settlement hereunder is made.

The principals to this contract mutually agree that it shall be binding upon their respective heirs, executors, administrators or assigns.

This contract, made in triplicate, when ratified by the seller contains the final and entire agreement between the parties hereto and they shall not be bound by any terms, conditions, statements or representations, oral or written, not herein contained.

C. P. Swart
Witness

H. R. HOWENSTEIN CO.

By H. R. Howenstein

Agent.

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale and acknowledge it to be our contract.

August 12th 19 31

Mrs. B. M. Fard

H. R. HOWENSTEIN CO.

H. R. Howenstein

Purchaser

(Seller)

Pro.

Accepted by Owner August 12th 19 31

(Wife of Seller)

Property is to be conveyed in the name of

Commission to Swart to be
\$8900 - total - \$2000 in cash +
\$6900 a month up paid by purchaser

H. R. Howenstein

C. P. Swart

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

MAY 16 1934

===== *Henry H. Morgan* =====

CLERK

IN THE

Court of Appeals, District of Columbia

No. 5988

E. V. R. SWEET

Appellant

vs.

H. R. HOWENSTEIN COMPANY,

A Corporation

Appellee

APPELLANT'S BRIEF

ROBERT H. MCNEILL,

Investment Building,

HERBERT S. WARD,

Southern Building,

Attorneys for Appellant.

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IN THE
Court of Appeals, District of Columbia

No. 5988

E. V. R. SWEET
Appellant

vs.

H. R. HOWENSTEIN COMPANY,
A Corporation
Appellee

APPELLANT'S BRIEF

STATEMENT OF FACTS

1. Prior to August 12, 1931, the appellant had negotiated with Mrs. Bertha M. Fravel to purchase the Wade Apartments located at Thirteenth and M Streets Northwest, which belonged to the defendant.

2. On August 12, 1931, the appellant brought the defendant and Mrs. Fravel together and a contract of purchase and sale of the Wade Apartments between the defendant and Bertha M. Fravel was entered into

(pages 22 and 23 of the record), and a check for \$5,000.00, drawn by Bertha M. Fravel on her account with the American Security & Trust Company, was delivered to the defendant, together with the executed contract.

3. After Bertha M. Fravel's departure the defendant, with the contract and check in his possession, by its President, indorsed on one copy of this contract the following:

“Commission to Sweet to be \$8,900; total, \$2,500 in cash and \$400 a month if paid by purchaser.

Approved:

H. R. HOWENSTEIN.

E. V. R. SWEET.” (Record, page 23.)

4. This check was not honored by the bank because on August 12, 1931, Bertha M. Fravel had on deposit \$867.41, subject to check and \$7,035.62 in her savings account (page 15).

5. Appellant endeavored to get Fravel's savings pass book. In the meantime defendant told appellant that Fravel wanted to withdraw from the deal (page 11).

6. August 19, 1931, appellant wrote defendant that he expected to hold “you and Mrs. Bertha M. Fravel for service rendered in connection with the sale of your property” . . . (page 12).

7. The day before (August 18) defendant handed to appellant Fravel's \$5,000 check, after cancelling his indorsement (Record pages 14 and 15).

8. On August 13, without appellant's knowledge or consent, defendant wrote Fravel, calling the deal off, but leaving the subject open for further negotiations (Record, page 12).

9. Mrs. Fravel said that, at the time defendant accepted the check, "I think I have that much money available in bank" (Record, page 13).

10. Payment was stopped on the check and Fravel never went into possession of the Wade Apartments (Record, page 13).

11. Appellant has never been paid anything for his services (Record, page 12).

ERROR RELIED UPON

1. That the Court erred in directing a verdict in favor of the defendant and against the plaintiff.

STATEMENT OF LAW INVOLVED

Point One

As soon as the contract was accepted by the owner, the agent's right to a commission attached.

ARGUMENT

Point One

The record shows that defendant's President, H. R. Howenstein, concluded the negotiations in this case, both with the purchaser, Fravel, and with the plaintiff, Sweet.

It is not a case where plaintiff got a signed contract, and a check for the first payment, and brought both to the defendant company for acceptance. Plaintiff brought his purchaser to the defendant's office and the seller negotiated his own contract. It was the de-

fendant that accepted the check for \$5,000 from the purchaser. He had it in his power to demand *cash* from the purchaser, but he did not do so. He was satisfied with the check and he approved the contract with the check in his possession. Sweet could not have compelled the purchaser to deposit cash, under these circumstances. The principal was dealing for himself and the agent, Sweet (appellant herein), was powerless. Defendant accepted the check, and the drawer of the check was good for the amount thereof. It is shown to have been a collectable check.

With the check in its possession, defendant's President entered into a subsequent contract, which is indorsed on the contract of purchase:

“Commission to Sweet to be \$8,900; total, \$2,500 in cash and \$400 a month if paid by purchaser.

Approved:

H. R. HOWENSTEIN.

E. V. R. SWEET.”

Howenstein knew just what he had when he made this contract with Sweet. He had a check for \$5,000, given for a valuable consideration, and a contract (Exhibit 2), which provided among other things things for the forfeiture of the deposit, or in the alternative, for enforcement against the seller either at law, or in equity (Par. 8), against the principals, their heirs, executors, administrators or assigns. This contract would be enforceable against the purchaser today, except for the defendant's letter of August 13, 1931.

The case of *Ruedy vs. Twigg*, 52 App. D. C., 58, would appear to control this case. In the *Ruedy* case the agreement to pay the agent's commission was an-

tecedent to the sale—the agent negotiated the sale and brought in the contract and check, and the seller accepted the contract and then permitted cancellation of the contract, because the check was not paid. The appellant court held that the lower court erred in taking the case from the jury.

In the case at bar, after plaintiff brought the parties together, defendant negotiated his own deal—accepted a signed contract, and a check—and with both in his possession, he thereafter entered into a contract to pay plaintiff \$2,500 in cash, and \$400 per month, if paid by the purchaser, until a total of \$8,900 had been paid to plaintiff as commission.

On this statement of facts the court took the case from the jury. Surely Sweet has a stronger claim than had Ruedy, where the commission contract was an antecedent agreement.

In Ruedy vs. Twigg the court stated the rule to be (page 61):

“As soon as the contract was accepted by defendant plaintiff’s right to a commission attached.”

It is respectfully submitted that Sweet’s right to a commission attached when this contract was accepted and that the trial court erred in directing a verdict. Wherefore, judgment herein should be reversed.

ROBERT H. McNEILL,
Investment Building,
HERBERT S. WARD,
Southern Building,
Attorneys for Appellant.

FOR MR. CHIEF JUSTICE MARTIN

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

MAY 29 1934

IN THE

Henry W. Hodges

CLERK

Court of Appeals, District of Columbia.

APRIL TERM, 1933.

No. 5988

E. V. R. SWEET, APPELLANT,

vs.

H. R. HOWENSTEIN COMPANY, A CORPORATION,
APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Appellee.

IN THE
Court of Appeals, District of Columbia

APRIL TERM, 1933.

No. 5988

E. V. R. SWEET, APPELLANT,

vs.

**H. R. HOWENSTEIN COMPANY, A CORPORATION,
APPELLEE.**

BRIEF ON BEHALF OF APPELLEE.

Statement of Facts.

The facts as set forth in the brief for appellant are not sufficient to give the Court a clear understanding of the actual facts involved in this appeal, and are, therefore, set forth more fully herein.

The appellant, E. V. R. Sweet, at the time of the matters complained of here, had been engaged in the real estate business in the District of Columbia for 13 years (R. p. 10). He had no office and no telephone listing, was not a licensed broker, and operated from his home which at that time was the Ebbitt Hotel at 10th and H Streets (R. p. 13).

In the early part of 1931 Sweet met a Mrs. Bertha M. Fravel (R. p. 13) who was running a rooming and boarding house (R. p. 14). He became quite well acquainted with her business and tried to interest her in the purchase of various properties, including the Grafton Hotel, the Conard Apartment and the London Hall Apartment (R. p. 14). In June, 1931, Sweet discussed with Mrs. Fravel the possibility of purchasing the Wade Apartment at 13th and M Streets, northwest (R. p. 10). Subsequently he went to the office of the H. R. Howenstein Company for the first time and saw a Mr. Rowzee and told Rowzee that *he had a client* who was interested in the purchase of property to be used in connection with a rooming house and asked him about the availability of the Wade Apartment, and Sweet may have said something about dividing a commission on any sale (R. p. 13). Later Sweet returned to the office of the H. R. Howenstein Company and saw Mr. Howenstein and told him that *he had a client* interested in buying the Wade and asked if a commission would be paid if *his client* should buy, to which, so far as the record shows, no reply was made (R. p. 13), although the plea avers that he was told he would be paid a commission only if he were a licensed broker which he said he was (R. p. 5). Mr. Howenstein gave Sweet a price of \$300,000 (R. p. 13) and furnished him data as to the income and expenses of the building (R. p. 11).

Sweet recommended Mrs. Fravel as a good buyer, telling Mr. Howenstein about the properties which she owned and the business which she conducted and her financial status, which Sweet said he had examined (R. p. 15).

Later Sweet reported to Howenstein that his client wanted to lease and not to buy, but he was told that could not be done (R. p. 13).

On August 12, 1931, Sweet, Mrs. Fravel and her son went to the office of the H. R. Howenstein Company to see

about buying the property (R. p. 14). During the conference which followed Sweet said nothing until the last minute, although *he was trying to get Mr. Howenstein below the price of \$300,000* (R. p. 14). Mrs. Fravel offered to pay \$250,000 for the Wade, then \$275,000 and then Sweet suggested they compromise on \$282,500 and this sum was finally agreed to (R. p. 14). Of this sum Mrs. Fravel was to pay \$12,500 in cash money of the United States and \$5,000.00 of this cash was to be paid as a deposit under the contract (R. p. 14). Mrs. Fravel said that she thought she had \$5,000 in bank (R. p. 13) and the contract of sale was thereupon drawn and signed (R. p. 22, 23) and Mrs. Fravel drew a check for \$5,000 on the American Security and Trust Company to the order of the H. R. Howenstein Company (R. p. 11) which was given to Mr. Howenstein. Mrs. Fravel and her son then left the office of the Howenstein Company (R. p. 11).

Sweet remained in the office to discuss his commission with Mr. Howenstein (R. p. 11, 14) and a notation was written on the bottom of one copy of the contract as follows (R. p. 11):

“Commission to Sweet to be \$8900—total—\$2,500 in cash and \$400 a month when as and if paid by purchaser. (Sgd.) H. R. Howenstein. Approved, (Sgd.) E. V. R. Sweet.”

On the other copy of the contract a similar notation was made as follows (R. p. 23):

“Commission to Sweet to be \$8900—total—\$2500 in cash & \$400 a month if paid by purchaser. (Sgd.) H. R. Howenstein. Approved (Sgd.) E. V. R. Sweet.”

Sweet does not know whether this \$8900 was more or less than the usual broker's commission but out of it he was to pay Mr. Howenstein's sales manager \$500 (R. p. 14).

At the time this notation was placed upon the contract both Sweet and Howenstein thought they had the five thousand dollars referred to in the contract (R. p. 13) and with reference to this \$5,000 there was no discussion between the parties about anything but *dollars* (R. p. 14). Sweet thereupon asked for \$500 on account and was told that he would not be paid anything until the check was cashed (R. p. 14). Mr. Rowzee was then sent to the bank to cash it, and Sweet was told later by Rowzee that the check could not be cashed (R. p. 14). Mr. Howenstein told Sweet that the check could not be cashed because it was drawn on Mrs. Fravel's savings account and the bank would not honor it unless it was accompanied by the deposit book and told Sweet to go to Mrs. Fravel and get the book (R. p. 11). Sweet went after Mrs. Fravel but did not find her; he then returned to Mr. Howenstein who told him that during his absence Mrs. Fravel had come to the office and wanted to withdraw from the deal (R. p. 11). Sweet saw Mrs. Fravel that night and later told Howenstein that she was going away for a few days, that she wanted the building very much, and that the failure to get the money for the check was just a detail which he (Sweet) could work out (R. p. 11).

On August 13, 1931, the H. R. Howenstein Company wrote to Mrs. Fravel, who was then at Orkney Springs, Virginia, that as the check was not honored by the bank it would not be considered as a deposit under her contract; *that the check had been returned to Sweet as her agent and the deposit receipt cancelled, but the company would be glad to negotiate further with her* (R. p. 12-13). Sweet admits receiving from Howenstein the check referred to in this letter and admits that he had this check in his possession at the time of trial, but claims that he did not get the check until about the 18th of August (R. p. 14-15). However that

may be, at the time the check was given to Sweet Mr. Howenstein was very anxious to have the deal consummated and Sweet asked him to let the matter rest for a few days and he would try to get Mrs. Fravel to go through with the deal (R. p. 14). At the same time Sweet was telling Howenstein this he was writing Howenstein personally that he intended to hold *both* Mrs. Fravel and him for "services rendered" but would keep him advised as to developments on Mrs. Fravel's return (R. p. 12), although he testified that when he wrote this letter he had no intention whatever of doing anything more to put the deal through than he had already done (R. p. 15).

The check was never cashed and Mr. Howenstein never got the five thousand *dollars* required as a deposit under the contract (R. p. 13).

Around the first of September, 1931, Sweet returned to the office of the Howenstein Company to see if the Wade Apartment would be sold on the same terms to any other responsible person and later took his then attorney, Norman Landreau, to the office to discuss the purchase of the property by him, in which purchase Sweet may have been putting up some money (R. p. 15).

Nothing further coming out of this matter to give Sweet any money, on September 30, 1931, he filed suit against the H. R. Howenstein Company, a corporation. The declaration contained two counts, one based upon the alleged contract to pay him a commission of \$8,900 and the second count for a quantum meruit of \$8,900 (R. p. 1-3). While the declaration alleges that the contract for commission was made with the Howenstein Company, a corporation, the affidavit of merit states that the agreement was made by H. R. Howenstein, individually (R. p. 3), a statement proved by the contract (R. pp. 11, 23).

The plaintiff testified at the trial substantially as above set forth and produced as his witnesses *his client*, Mrs. Fravel, and a representative of the American Security and Trust Company. Mrs. Fravel was asked to do nothing more than identify her signature on the contract and check and indentify the letter she received from the H. R. Howenstein Company (R. p. 15). The representative of the American Security and Trust Company testified as to the balances maintained by Mrs. Fravel in her checking account and in her savings account, which latter account he testified was not subject to check (R. p. 15). On the day Mrs. Fravel drew her check for \$5,000 as above set forth, in the account which was subject to check she had only \$867.41, and at no time from the date of the contract to the 1st of September, 1931, at which time the transaction was to be completed, did she have enough money in either the checking or savings account, or in both together, to pay the \$12,500 cash required by the terms of her contract (R. p. 15-16).

At the conclusion of the trial, the plaintiff dismissed the second count of the declaration (R. p. 16) and the Court thereupon directed a verdict for the defendant on the first count (R. p. 16) from which action of the Court this appeal is taken.

ARGUMENT.

The Action of the Trial Court in Directing a Verdict Was Correct.

The plaintiff claimed in the first count of his declaration that on August 12, 1931, he was employed by the H. R. Howenstein Company, a corporation, to negotiate the sale of certain described real estate owned by it, for the sum of \$282,500, and that the Company promised to pay him \$8,900 when he should produce a purchaser ready, able

and willing to make the purchase on terms to be mutually agreed upon; that he then and there produced Bertha M. Fravel, who was ready, able and willing to purchase on terms which were then and there agreed to, and who entered into a contract to make the purchase; by reason of which the corporation owed the plaintiff \$8,900 (R. p. 2).

The trial court properly directed a verdict upon the testimony produced by the plaintiff because:

1. There was no proof that the plaintiff produced a purchaser, ready, able and willing to buy on the defendant's terms.

2. There was no proof that the sale failed because of any fault of the defendant; the proof was that the fault lay with the prospect produced by the plaintiff.

3. There was no valid contract of purchase, the consideration (\$5,000 cash) never having been given or received.

4. The agreement to pay commissions to the plaintiff was not absolute but was conditional upon the receipt of payments from the purchaser, which were never received.

5. The agreement to pay commissions was based upon the supposed contract of purchase, and upon the failure of this there was no consideration for the commission agreement.

6. The basis of the plaintiff's claim was an agreement entered into with the defendant corporation, while the proof was not of an agreement with the corporation but with an individual.

7. The plaintiff had abandoned any claim by undertaking to enter into a further deal respecting the property.

I.

The Plaintiff Did Not Produce a Purchaser Ready, Able and Willing to Buy on the Principal's Terms.

In *Mannix v. Hildreth*, 2 App. D. C. 259, speaking of the right of a real estate broker to a commission, this Court said:

“He becomes entitled to his commission when he shall have procured a purchaser at the *owner's price and terms* who is *ready to close and able to perform* the contract.” (Italics ours.)

The price given to Sweet by Howenstein was \$300,000 (R. p. 13) but in the negotiations which followed Sweet, by his own admission, was trying to get Mr. Howenstein below his price of \$300,000 (R. p. 14). The price finally agreed upon was \$282,500, of which \$12,500 was to be paid in United States money and of which \$5,000 was to be paid in United States money as a deposit (R. p. 14); the balance was represented by the assumption of a first deed of trust for \$150,000 then on the property and a second deed of trust for \$120,000 to be given by Mrs. Fravel, payable in monthly instalments of \$1,000; and by the terms of the contract Mrs. Fravel was to pay to the Howenstein Company each month \$2,056.27 on account of this payment, interest and taxes (R. p. 22).

There is no suggestion in the record that the defendant was willing to take pieces of paper in the form of checks in lieu of the \$12,500 which it was to have under these terms. The fact is to the contrary for Sweet testified as follows:

“As finally agreed to, Mrs. Fravel was to pay \$282,500, of which \$12,500 was to be paid in United States money, of which \$5,000 was to be a deposit; there was no discussion with reference to the \$5,000 or \$12,500 about anything but dollars;” (R. p. 14, italics ours.)

This is the only foundation in the record for the argument now attempted to be made by Sweet in his brief (p. 4) that the defendant could have demanded cash but was satisfied with a check and he (Sweet) was powerless to compel the payment of cash.

The record also shows that Sweet testified that both he and Howenstein thought they had the five thousand *dollars* referred to in the contract, as Mrs. Fravel said she thought she had that much money in bank, but that Mr. Howenstein never did get the *dollars* as the check was not honored (R. p. 13).

The plaintiff, therefore, did not produce a purchaser on the owner's terms, namely, one to pay five thousand *dollars* cash as a deposit. Nor, in the language of the Mannix case, *supra*, did Sweet have in Mrs. Fravel a purchaser "ready to close and able to perform the contract."

Mrs. Fravel was not ready to close. She seems to have evidenced some desire to buy while she was in the office of the defendant with Sweet, but within the hour after she left Sweet she returned to the office of the Howenstein Company and "wanted to withdraw from the deal as she was very nervous over the transaction" (R. p. 11). Whether Mrs. Fravel stopped payment on her check, as Sweet understood she had (R. p. 13) or whether it could not be cashed because it was drawn on an account which was not subject to check (R. p. 15), despite what must have been the fervent efforts of Sweet to get the *money* which the Howenstein Company wanted and required as a deposit to bind the contract, and despite the fact that Sweet almost immediately obtained possession of Mrs. Fravel's check for \$5,000 which he retained even as late as the trial of this case (R. p. 16), Sweet did not get the money.

"It is settled law that a broker, before he is entitled to his commission, must not only find a purchaser able, ready and willing to buy, but upon the *identical terms*

authorized by his principal. It is a rule of agency which admits of no exception, and courts do not hesitate to strictly enforce it.”

Heurich v. Sullivan, 52 App. D. C. 95.

Furthermore, the testimony produced by Sweet shows that Mrs. Fravel was not able to perform the contract which required her to pay the total of \$12,500 by September 1, 1931, the date fixed for closing, as at no time did she have that much money available (R. p. 15). Mrs. Fravel was called as a witness by the plaintiff but not asked whether she had any other means of complying with the terms of the contract than out of her bank accounts (R. p. 15).

II.

The Consummation of the Sale Was Not Prevented by Any Fault of the Defendant.

In *Dotson v. Milliken*, 27 App. D. C. 500, this Court has said that a real estate broker is entitled to a commission, even though the sale is not consummated

“* * * provided the consummation is prevented by the refusal, fault or defective title of the principal.” (Italics ours.)

The defendant in this case did not refuse to complete the transaction. Sweet testified that after Howenstein struck the endorsement from Mrs. Fravel's check and handed the check to him

“Mr. Howenstein was very anxious to have the deal consummated, and so was I, and asked him to let the matter rest for a few days and I would try to get her to go through with the deal;” (R. p. 14.)

There is no contention in the brief filed with this Court that the sale was not consummated because of the refusal,

fault or defective title of the defendant; such a contention could not be made in the face of the record in this case.

III.

There Was No Valid Sales Contract Entered Into By the Defendant, As It Never Received the Consideration.

The contract which was signed by Mrs. Fravel and the H. R. Howenstein Company and which appears in the record at pages 22 and 23 was signed in consideration of a cash payment of five thousand *dollars*; Mrs. Fravel understood that she was to give that amount in *money* and said "I think I have that much *money* available in bank" (R. p. 13) and gave the check to enable the Howenstein Company to get \$5,000 in money.

Bearing in mind that the defendant required cash money as a deposit, when the check could not be cashed, there being no agreement to accept the check in lieu of cash, the consideration failed and the terms of the defendant were not met.

In the case of *Barbagello v. Fishbein*, 52 App. D. C. 318, this Court has said, relative to a payment by check:

"The claim that rent was paid for an extension of the tenancy was not sustained by the evidence, since it appeared that the check whereby the alleged payment was made was returned unpaid for want of funds."

In *McFarland v. Howell*, 162 Iowa 40, suit was brought by a real estate broker to recover a commission. McFarland, a broker, had obtained a contract which he signed on behalf of his principal and had taken a check as a deposit. Before the contract was presented to the principal, however, the property was sold through another agent. In holding that McFarland could not recover the court says:

"There is another view under the evidence which is equally controlling against the appellee. The check for

\$1,000 given by Rasmussen was made payable to the Farmers Savings Bank or order, and was drawn on the same bank * * *. It was not cash, although so stated to be by McFarland over the telephone; * * *. But beyond this appears in the testimony of McFarland the statement 'I never got it cashed; I could not cash that one' referring to the check. The general rule is that when a check is received by the creditor there is no presumption that he takes it in payment, but on the contrary, the implication is that it is only to be regarded as payment when cashed. 2 Daniel, Negotiable Instruments, Sec 1623; *Dille v. White*, 132 Iowa 327. To this rule there is the qualification that the creditor may, if he pleases, accept it as payment, it being a question of fact as to the intent of the parties. McFarland's authority was to receive cash. He accepted an instrument upon which he could not draw the money. It therefore was not a payment in cash."

IV.

The Agreement to Pay a Commission Was Conditional Upon Payments Being Made By the Purchaser; and No Such Payments Were Made.

Whether the wording of the agreement respecting commission is taken as shown in the record at page 11 or at page 23, it is clear that the intention of the parties was to pay the commission only "when, as and if" or "if" payments were made by the purchaser. It being clearly shown by the testimony produced by appellant that the purchaser made no payments whatsoever, not even the required deposit, appellant obtained no right to commission.

In the case of *Amies v. Wesnofske*, 255 N. Y. 156, decided by the Court of Appeals of New York in 1931, in an opinion in which Chief Justice Cardozo concurred, the court considered the right of a broker to a commission which was to be paid "on the closing of title." The court held

that such an agreement was contingent and the agent could not recover if the contingency did not happen, saying:

“The employment of such words as ‘when,’ ‘after’ or ‘as soon as’ clearly indicate that a promise is not to be performed except upon a condition. Williston on Contracts, vol. 2, sec. 671. Promises to pay broker’s commissions, for the procurement of sales of real estate are conditional when expressed to be performable ‘on the day of passing title’ (*Leschziner v. Bauman*, 83 N. J. L. 743); ‘when the sale is completed’ (*Sams v. Olympia Holding Co.*, 153 Wash. 254, 257); ‘upon delivery of the deed and payment of the consideration’ (*Tarbell v. Bomes*, 48 R. I. 86, 87); ‘at settlement, of the total consideration’ (*Simon v. Myers*, 284 Pa. 3, 6); ‘when the sale is consummated’ (*Alison v. Chapman*, 36 Cal. App. 759, 760); ‘at the date of passing title’ (*Baum v. Goldblatt*, 81 Pa. Super. Ct. 233, 238); ‘at the time of the consummation’ of the sale (*Morse v. Conley*, 83 N. J. L. 416, 417); if the ‘deal is completed’ (*Pratt v. Irwin*, Mo. Sup., 189 S. W. 398, 399); ‘if the deal now pending’ is consummated (*Goodwin v. Siemen*, 106 Minn. 368, 369); ‘only when the seller’ has ‘received her full purchase price’ (*Norris v. Walsh*, 71 Colo. 185, 186). In *Alder v. Boyle*, 4 Man. G. & S. 635, the agreement was to pay an agent, for the procurement of an exchange of advowsons, the sum of £100, ‘one-third down, the remaining two-thirds when the abstract of conveyance is drawn out’. The third party failed to deliver his abstract to the defendant and the exchange fell through. It was held that commissions were not recoverable; Wilde, C. J., saying: ‘It appears to me to be perfectly plain that the money was to be paid only upon the happening of an event that has not occurred.’ It has been suggested that a promise to pay ‘when’ a named event happens, or ‘upon’ the happening of the event, may not be differentiated from a promise to pay ‘if’ the event happens; that the promise to pay is absolute, and the words ‘when’ or ‘upon’ refer only to the time of perform-

ance. Certainly, whether the one construction or the other be correct, the result must be the same; since, if the event does not befall, or a time coincident with the happening of the event does not arrive, in neither case may performance be exacted."

In *Murray v. Rickard*, 103 Va. 132, the contract for the payment of commissions read as follows:

"allowing you a commission of 5% on the purchase, said commission to be paid out of the payments as made."

Rickard was paid the commissions due him on all instalments received but when the purchaser defaulted he sued to recover the whole balance of his commissions. The court held that a proper construction of his contract precluded recovery, saying:

"It seems too clear to admit of argument that the parties themselves understood that the compensation of the appellee Rickard was to be contingent upon payments being made by Wheelock in performance of his undertaking as purchaser."

In the case at bar the understanding between Sweet and Howenstein was clearly that Sweet was to be paid only as and if the contract was performed. The cash payment to be made on the signing of the contract was \$5,000—Sweet was to get \$2,500 in cash, which was one-half of the deposit; the monthly payments under the contract were \$2,056.27 payable on the first day of each month—Sweet was to get \$400 of that each month.

The acts of the parties are significant in showing that the agreement to pay commissions was understood to be contingent upon receiving money from the purchaser, for Sweet asked for an advance of \$500 immediately he signed

the commission agreement and Howenstein refused to give it to him until he first found out that he had the \$5,000 cash in his hands, and Sweet acquiesces in it for the record shows no objection made by him.

“When the notation about commission was placed on the contract, I asked Mr. Howenstein for \$500 on account, and he said that as a matter of business he ought to first send the check down for collection; * * * he said he would not pay me anything until the check was cashed.”

(Testimony of Sweet, R. p. 14).

As was said in the case of *Alison v. Chapman*, 36 Calif. App. 759, where the agreement was to pay commissions “when the sale is consummated”:

“This was not strictly the case of a broker employed to go out and find a purchaser on certain terms. The broker has found the purchaser and brought him to the vendor. A contract was thereupon entered into by which the purchaser became bound to the vendor to buy the property upon terms satisfactory to the vendor. The question of the ability of the vendee to carry out his contract to purchase the property may have been the very reason why the vendor agreed to this contract only upon condition that the commission should be paid when the deal was finally closed.”

Such are the facts in the case at bar, and counsel for appellant fully recognized the fact that the agreement to pay a commission was dependent upon compliance by the purchaser with the terms of her contract when they argued to the trial court that the “notation on this contract is a notation which is integral with the contract as a whole” (R. p. 16).

The consideration for the agreement to pay Sweet commissions was that he had produced a purchaser, *recom-*

mended by him as a good, sound business woman and as a good buyer (R. p. 14, 15) and that she had already paid over the five thousand *dollars* required by the terms on which the defendant was willing to sell, and that she was able to meet the other terms as set forth in the sales agreement. When it immediately developed that the prospective purchaser was not such a sound business woman and that she either could not or would not pay the five thousand *dollars* which she was required to pay in order to bind her contract, there was an utter failure of the consideration which was the basis of the agreement to pay commissions.

Furthermore, there was a variance between the allegations of the declaration and the proof. The declaration was based upon an express agreement with the H. R. Howenstein Company, a corporation, (R. p. 2). The proof (R. pp. 11, 23) and the sworn affidavit of merit filed by the plaintiff in support of his declaration (R. p. 3), show an agreement with H. R. Howenstein, individually, not with the corporation, and with no claim whatever that in signing the agreement to pay commissions he was acting for the corporation.

And still further, there was an abandonment by Sweet and a recognition that he had no claim for commissions as the matter then stood when he subsequently tried to sell the property to his then attorney, and join with him in the purchase (R. p. 15).

Appellant, in presenting his case to this Court, rests his case upon the sole proposition that as soon as the contract was signed by the H. R. Howenstein Company he was entitled to a commission of \$8,900, citing in support of this contention the case of *Ruedy v. Twigg*, 52 App. D. C. 58. In that case the court held that an owner could not arbitrarily refuse to approve a contract, having stated that

he was satisfied with its terms, and that if the owner did arbitrarily refuse to carry out the contract he was liable for commissions. This is simply the application of the rule of *Dotson v. Milliken, supra*, to a case where the failure was due to the default of the owner of the land. The failure in the present case was on the part of the proposed purchaser.

A more pertinent case is that of *Fox v. Cohen*, 34 App. D. C. 389, having regard to the fact that the record shows that Sweet examined Mrs. Fravel's financial status and recommended her as a good buyer, telling Mr. Howenstein that she was a woman of good business standing, that she owned certain property, had a good rooming house business (R. p. 15) and that she was a good sound business woman (R. p. 14).

In the case of *Fox v. Cohen, supra*, the Cohens advertised a house for sale and Fox, seeing the advertisement, took Waldron to them as a prospective purchaser, telling them that Waldron was "all right in every respect." A few days later Fox presented a contract of sale to the Cohens, signed by him as agent with Waldron as the purchaser. The contract was signed by the Cohens and the deposit of \$100 made thereunder was retained by Fox as the agent. Waldron refused to perform the contract and the deposit was forfeited. Cohen then sued Fox for the \$100 and he defended on the ground that his commission amounted to more than that amount. Judgment was given against Fox. In affirming this judgment this Court said:

"The contention of the appellant is that, when an agent procures a purchaser on the terms proposed by the principal, and the latter accepts the purchaser, then he is entitled to his commissions whether the defaulting purchaser is or is not responsible.

The contention, on the other hand, is that before the agent is entitled to compensation, the purchaser must not only have entered into an agreement to purchase, but must also have actually complied with its terms, unless compliance is prevented by the fault of the principal. This proposition has the support of some well considered cases in Maryland and elsewhere. *Kimberly v. Henderson*, 29 Md. 512-515; *Richards v. Jackson*, 31 Md. 253; *Riggs v. Turnbull*, 105 Md. 135-148; *DeSantos v. Taney*, 13 La. Ann. 151. Under the facts of the case it is not necessary to pass upon these conflicting contentions. The relation between a principal and his agent is of a confidential nature, requiring perfect good faith on the part of the latter, and entitling the principal to the benefit of his knowledge and advice. When the appellant procured the purchaser, he said that he believed him to be responsible, and that he was 'all right in every respect.' Upon this representation the appellees acted. There was no reason why they should prosecute an independent inquiry before accepting the purchaser. The sale was not to be made solely upon credit. If the purchaser was 'all right' he could be expected to make the small cash payment, and then the lien upon the property would be security for the deferred payments.

Under these circumstances it would be unjust to make appellees pay a commission for a sale that the irresponsible purchaser refused to complete. We are not to be understood as intimating that the appellant acted in bad faith; doubtless he fully believed that the purchaser intended to comply. But the proposition of law for which he contends would offer a temptation to careless or unprincipled agents to make sale to irresponsible bidders at high prices, without any reasonable expectation that the terms of the sale would be complied with or could be enforced."

It is respectfully submitted that the action of the trial court in directing a verdict was correct and that the prop-

osition for which the appellant contends is the same which this Court has already characterized as such as would

“offer a temptation to careless or unprincipled agents to make sale to irresponsible bidders at high prices.”

Fox v. Cohen, supra.

and that the action of the lower court should be affirmed.

Respectfully submitted,

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(5017-C)